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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 131

THE M. J. ULINE COMPANY, *Petitioner*,

v.

WASHINGTON SPORTSERVICE, INC., *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit entered on November 16, 1962.

CITATION TO OPINIONS BELOW

The opinions of the Court of Appeals, printed in Appendix A hereto, *infra*, pp. 2a to 21a, are reported in 276 F. 2d 523 and 313 F. 2d 889.

JURISDICTION

The judgment of the Court of Appeals was entered on November 16, 1962. (R. 211) A timely petition for rehearing (R. 212) was denied (six to three) on January 25, 1963. (R. 229) On April 20, 1963 an order was entered extending the time for filing petition for writ of certiorari until May 15, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Under the doctrine of "law of the case", can an opinion which remands for a finding on one issue be given effect upon a second appeal as an adjudication of other issues not discussed or mentioned in the remand opinion?

2. Is a litigant who twice prevailed on the merits in the District Court—once before and once after remand—deprived of his appellate rights when final judgment is directed against him on a second appeal even though both appellate opinions are wholly silent on the merits?

STATUTES INVOLVED

The statutes involved are D.C. Code (1961) §§ 45-801, 45-813, 45-820 and 45-904. They are printed in Appendix A, *infra*, p. 1a.

STATEMENT

In 1960 the Court of Appeals set aside a judgment in favor of petitioner and remanded the case for a finding on a question of fact which might render unnecessary determination of the legal issues. On that appeal the court did not discuss or even mention the legal

questions presented. The remand opinion instructed the District Court that, after it made this finding, it would be "free" to "enter such judgment as it may be advised as to the obligations between the respective parties." (276 F. 2d at 524) Petitioner again prevailed in the trial court on the legal issues and obtained judgment on the merits. In 1962, on the second appeal, a different panel of the Court of Appeals reversed with instructions to enter judgment against petitioner on the merits. The new panel did not consider the legal questions presented but relied on the 1960 opinion as establishing the "law of the case" against petitioner. It held that the 1960 panel had ruled against petitioner on the legal issues, although the 1960 opinion did not even state the issues. Chief Judge Bazelon dissented. He pointed out that the majority's extraordinary use of the doctrine of "law of the case" operated "not to cut off reconsideration of the merits, but to cut off any consideration at all". (313 F. 2d at 897).[1]

This case arose from a lease which gave respondent exclusive concession rights from November 1941 to June 1947 at petitioner's arena. (R. 6) In 1945 the parties agreed to extend the term one year for every thousand dollars expended by the lessee for improvements. (R. 117, 120) In 1955 petitioner brought an action seeking a declaratory judgment that the lease had ended. (R. 1) Respondent had spent $37,500 for improvements and claimed that the lease was extended for 37½ years. (R. 14-15, 21-22, 107) Petitioner contended that the 1945 agreement created a

[1] The 1960 appeal was heard by Mr. Justice Reed, Chief Judge Prettyman and Judge Edgerton. The 1962 appeal was heard by Chief Judge Bazelon and Judges Miller and Bastian.

tenancy from year to year which by statute was converted into a tenancy at sufferance (D.C. Code (1961) Sec. 45-820), and moreover that under contract law the agreement was unenforceable for lack of mutuality. In a trial without jury, the court (Letts, J.) adopted petitioner's contentions that the lease was ended; but in accord with petitioner's proposal to pay respondent for the improvements as depreciated to avoid unjust enrichment, the court ordered payment of $31,500. (R. 104, 107 ff).

On the first appeal petitioner also argued that the 1945 extension agreement contained an express termination provision, but there was a question as to whether it had been deleted. Because inclusion of the termination clause in the agreement would moot the legal questions and because the trial court had made no finding on this issue, the Court of Appeals set aside the judgment below and remanded the case for a finding as to "whether the termination sentence is in the agreement. . . ." (276 F. 2d at 524) As to the legal questions presented, however, the opinion said nothing. The judgment remanded the case for "further proceedings consistent with the opinion of this court." (R. 129)

On remand, the trial court (Hart, J.) found that the termination sentence was not in the agreement. No new evidence was taken, and the trial court's other findings were substantially similar to the original findings. (R. 135-138) The court held that since the term of the 1945 agreement was uncertain and indeed at the will of the lessee, it did not create an estate for years, that after June 1947 respondent was a tenant by sufferance (D.C. Code (1961) Sec. 45-820), and furthermore that the agreement lacked mutuality.

(R. 139-140). No suggestion was made by the tenant that the "law of the case" barred the trial court from holding the tenancy an estate by sufferance. (See R. 149 ff, 172 ff)

On the second appeal, the Court of Appeals again did not consider the merits. The majority held that the 1960 decision had already adjudicated all legal questions against the petitioner. They based this holding on inferences drawn from the second sentence of the 1960 opinion:

> "The question now before us is whether the agreement allows a cancellation at the option of the Vline Company before the expiration of the term and, if so, under what conditions."

From this sentence the 1962 majority found it "quite clear" that the 1960 opinion had rejected each and all of petitioner's legal contentions. (313 F. 2d at 892)

A petition for rehearing en banc was denied. (R. 212, 228, 229) Among the three judges who favored rehearing was Judge Edgerton (R. 229), the only participant in the 1960 opinion who was still a member of the court.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below conflicts with applicable decisions of this Court. *Mutual Life Ins. Co.* v. *Hill*, 193 U.S. 551, 553-554 (1904); *Hartford Life Ins. Co.* v. *Blincoe*, 255 U.S. 129, 136 (1921). Chief Judge Bazelon's dissent so states. 313 F. 2d at 896-897. These cases establish that while an affirmance is deemed to dispose of all claims of error, a decision setting aside and remanding becomes the law of the case only with respect to "questions in terms dis-

cussed and decided." In the 1960 opinion none of the legal questions was "discussed and decided." The 1962 opinion relies on strained inferences; the majority is unable to point to a single word in the 1960 opinion as an express holding on the merits. Indeed, the 1960 panel showed that it left the merits to the District Court by stating in the last sentence of the opinion that the trial court was to be "free" to "enter such judgment as it may be advised" after making its finding on the termination clause.

2. By settled principles, where a court reverses and remands, the express statements in the opinion afford guidance to litigants and the inferior court as to the nature and scope of the decision. See *Re Sanford Fork & Tool Company*, 160 U.S. 247, 256 (1895). The holding below would throw such orderly procedure into doubt and confusion. When the court remanded in 1960 only a clairvoyant could find in the opinion any final rulings on the questions presented. But the court below by a strained interpretation of the 1960 opinion has now found such rulings, and has held them binding and conclusive. If this holding stands, many decisions of our Courts of Appeal will be potential traps, because unsuspected dispositive rulings may later be read into them. Rather than run the risk of being foreclosed by some hidden "law of the case", attorneys will tend to file a multitude of motions to clarify decisions of Courts of Appeal, and in all likelihood a multitude of petitions for certiorari to this Court. Moreover, trial courts will also be perplexed, and in many cases which otherwise would end in the District Court the new uncertainties as to "law of the case" will promote appeals. The problems thus created for the orderly procedure of the lower courts call

for review by this Court in the exercise of its supervisory powers over the lower federal courts.

3. This Court is concerned that litigants have their day in court and that the federal appellate process assure them a genuine consideration of the issues. See *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U.S. 257, 265-267 (1910); *Saunders* v. *Shaw*, 244 U.S. 317 (1917). Beyond any doubt, if petitioner had been the appellant below, it would have had a right to appellate consideration of its contentions. An appellee is no less entitled to consideration of its contentions before a judgment in its favor can be reversed by an appellate court with directions to enter a final judgment against the appellee. Petitioner has been deprived of this right to appellate review. Nowhere in the course of two appeals is there a single word to show appellate consideration of petitioner's contentions on which it prevailed before two District Court judges. The court below does not even state that these contentions are insubstantial or that they are without merit. The majority has reached this result by finding several *sub silentio* dispositions in the 1960 opinion and then applying the doctrine of law of the case. If this strange departure from the doctrine of law of the case is permitted to stand, the right to appellate review in the federal courts becomes illusory.

4. The question is of major importance to the law in the District of Columbia. See *Reed* v. *Allen*, 286 U.S. 191 (1932); *Best* v. *District of Columbia*, 291 U.S. 411 (1934). The effect of the decision below is to permit the parties to override the declared policy of Congress expressed in D.C. Code (1961) §§ 45-801, 45-818, 45-820 and 45-904. Congress has provided that apart from estates for inheritance and estates for life, only

an estate for years is not determinable upon 30 days' notice or less, and an estate for years must be "for a determined period of time". It has long been the rule in the District of Columbia that the cardinal requirement of an estate for years is that "it must be for a greater or less period of fixed duration" and that if the parties create an estate from year to year, such an estate shall be an estate by sufferance. *Morse* v. *Brainerd*, 42 App. D.C. 448, 450 (1915). The court below has now enforced as an estate for years the 1945 extension agreement even though the duration of the term was indefinite and at the lessee's will, as the remand court specifically found in Finding of Fact No. 7. (R. 137) Inevitably the decision will seriously unsettle the District of Columbia law of real estate. And the uncertainty will be compounded because the decision turns on the law of the case, without any express holding or explanation. If real estate law in the District of Columbia is to undergo a change of such far-reaching importance and in the face of the apparent declared policy of Congress, the question should at least be considered and passed upon by the court below.

CONCLUSION

The petition for certiorari should be granted. The judgment of the court below should be summarily reversed and the case should be remanded to the Court of Appeals for consideration of the merits.

Respectfully submitted.

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